Supreme Court, U.S.
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90-1452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LEAR SIEGLER, INC., a Delaware Corporation,
Petitioner,

v.

RANDALL SCOTT KIRBY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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March 13, 1991

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QUESTION PRESENTED

Whether the court of appeals in this diversity case departed from settled principles governing federal court determinations of state law by expressly rejecting and refusing to follow the latest decision from a state intermediate appellate court.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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PETITION FOR WRIT OF CERTIORARI

Lear Siegler, Inc. ("Lear Siegler") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-2a) is unreported. The opinion of the district court (App. B, *infra*, 3a-10a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered in November, 1990. The court denied a timely petition for rehearing on December 13, 1990 (App. D, *infra*, 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This product liability suit involved the application of Missouri common law, as set out fully below, by a federal court.

STATEMENT OF THE CASE

A. The Accident

This is a product liability action arising from an accident in 1986. Respondent Randall Kirby was injured while using a fifty-one foot long portable grain auger manufactured by petitioner Lear Siegler. A grain auger is a simple farm implement used to transport seed or grain. A long rotating corkscrew encased in protective housing carries grain or seed from an intake area on the auger to the auger downspout. It is a familiar scene on farms to see a stream of grain or seed pouring from the top of an auger into a waiting grain truck or silo.

Lear Siegler manufactured the auger involved in this case in 1979. When it left the factory, the auger had a guard over the intake opening at the bottom of the auger as well as protective guards mounted over the entire length of the drive shaft. These guards were designed to be easily removable for routine maintenance, including lubrication. The guards also had to be removed to clear the auger if it became clogged.

On the day of his accident, Kirby was loading grass seed into a grain truck from the warehouse of his employer, the Empire Seed Company. Empire Seed loaded grass seed onto trucks through an opening high on the wall of the warehouse by use of the portable grain auger. The process of loading seed with the auger required two tractors. One tractor had a power take off ("PTO") shaft connected to the auger, which supplied the power to drive the auger. Empire Seed used the second tractor to load grain into the intake end at the bottom of the auger.

Empire Seed jury-rigged the storage of seed at this warehouse to help dry it. Along one wall of this warehouse it mounted dryers at floor level. Along another wall it laid large concrete blocks on the floor, and stacked hollow wooden pallets on top of the blocks. It then spread cheesecloth over the top of the pallets to prevent the seed from falling through the pallets and cinder blocks, and the seed was piled on top of the cheesecloth. Understandably, the auger from time to time became clogged with cheesecloth, broken pallet boards and even pieces of broken concrete block. Such a clog caused the auger or its power unit to shut down and the operator had to clear the clog before the auger could operate again.

On the day of his accident, Kirby was loading seed into the intake opening on the auger using the tractor equipped with a front-end loader. Kirby noticed that the auger had clogged and left the loading tractor to turn off the power. He then cleared the clog by sliding a metal sleeve covering an inspection hole on the auger down the auger tube to expose the hole. Kirby reached into the auger and pulled out a piece of cheesecloth. Kirby did not have to remove the guards over this part of the drive shaft to clear the clog on this day, however. Empire Seed had removed the guards earlier and they were missing at the time of the accident.

Once Kirby cleared the clog, he restarted the power drive tractor. After he had determined that the auger was once again running normally, Kirby got off the power drive tractor and left it running. Because the auger was operating and the inspection hole was not covered by its sleeve, seed was coming out of this hole. Kirby approached the auger intending to slide the sleeve or cover back up the auger to cover the inspection hole. As he reached over the top of the unguarded, rotating drift shaft, with the inspection hole open, Kirby's shirt sleeve was caught and his left arm was drawn into the drive shaft and injured.

Kirby admitted repeatedly, as did his experts, that the accident would not have happened if the guards furnished with the auger had not been removed.

B. Proceedings in the Lower Courts

In December of 1987, Kirby filed a complaint against Lear Siegler in federal court in Missouri claiming under both negligence and strict liability theories. Kirby claimed that Lear Siegler had defectively designed its auger in a variety of ways and that it failed to warn of these defects. Kirby also sought punitive damages.

After substantial discovery, Lear Siegler moved for summary judgment. Lear Siegler contended that under clear Missouri law a manufacturer has no liability when a purchaser modifies a safe product and that modification makes the product unsafe. *See Gomez v. Clark Equipment Company*, 743 S.W.2d 429 (Mo. App. 1987). The manufacturer is absolved even when the modification is foreseeable. *Id.* at 432. As discussed fully below, the trial judge denied the summary judgment motion (App. C, *infra*, 11a-15a), concluding that the three Missouri appellate judges in *Gomez* had incorrectly interpreted Missouri law regarding modification.

The case then went to trial solely on the issue of strict liability for design defect and failure to warn, and the jury returned a verdict of $500,000. The trial judge subsequently denied Lear Siegler's motion for judgment notwithstanding the verdict and alternative motion for a new trial. The federal judge again ruled that the Missouri appellate judges had incorrectly interpreted Missouri law. App. B, *infra*, at 6a-8a.

Lear Siegler appealed the case to the Eighth Circuit. That court affirmed the trial judge's rulings by unpublished per curiam order. App. A, *infra*, at 1a-2a.

REASONS FOR GRANTING WRIT

The concept of "our federalism" represents a delicate balancing of legitimate state and federal interests. *Younger v. Harris*, 401 U.S. 37, 44 (1971). The federal courts here have failed that balancing miserably. A single federal trial judge in the court below ruled that a panel of three Missouri appellate judges, which decided the dispositive Missouri decision, simply did not understand and therefore misinterpreted and misapplied Missouri law. He therefore refused to follow the only Missouri law on point. The Eighth Circuit affirmed the trial court without explanation or opinion. The Eighth Circuit decision is therefore directly contrary to the most recent pronouncement of Missouri law by a Missouri appellate court.

The affront to principles of federalism is obvious. Federal courts are required to follow decisions of state appellate courts. Without more, this Court has ample ground to review this decision. But the practical consequences are likewise dramatic. A product manufacturer sued in Missouri state court has a complete defense if a consumer modifies a product and later suffers an injury. The same manufacturer in federal court has no such defense. This erroneous ruling will lead to widespread forum shopping by plaintiffs who can satisfy diversity jurisdiction. The very existence of this split in authority demands intervention by this Court.

It is the primary responsibility of state courts, not the federal courts, to construe and apply state statutes and common law. The express refusal of a federal court to follow state law as announced by a state appellate court has long been grounds for review of the federal decision. *See, e.g., Six Companies v. Highway District*, 311 U.S. 180 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940). Indeed, in certain instances the Court has acted summarily to preserve the integrity of these principles of federalism announced in *Erie R. Co.*

v. Tompkins, 304 U.S. 64 (1938). *See, e.g., Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975); *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956). The instant case deserves similar treatment. The decision of the court of appeals is so plainly wrong that it should not be allowed to stand, and summary reversal is justified. *See, e.g., Freeport McMoRAN, Inc. v. K.N. Energy, Inc.*, 111 S.Ct. 858 (1991).

I. THE COURT OF APPEALS PLAINLY VIOLATED THE FUNDAMENTAL PRINCIPLES ESTABLISHED BY THIS COURT FOR DETERMINING STATE LAW

A. The Court of Appeals Ignored Controlling State Court Decisions

This Court ruled in *Erie* that federal courts must follow state substantive law in cases in which state law is the source of the cause of action. The *Erie* principle "expresse[s] a policy that touches vitally the proper distribution of judicial power between state and federal courts" that is "so important to our federalism." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-10 (1945). Its purpose is to ensure that the state and federal courts in a state apply the same substantive law irrespective of the happenstance of federal jurisdiction. Such even-handed justice discourages forum shopping and avoids unfair discrimination between state and federal litigants. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965) ("the twin aims of the *Erie* rule . . . [are] discouragement of forum-shopping and avoidance of inequitable administration of the laws"). "The *Erie* rule remains a vital expression of the federal system and the concomitant integrity of the separate States." *Ferens v. John Deere Co.*, 110 S. Ct. 1274, 1280 (1990).

The duties of federalism are not limited to state supreme courts. A federal judge must follow and apply the decision of state intermediate appellate courts just like

state supreme courts. The decision of an intermediate state appellate court " 'is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' " *Hicks v. Feiock*, 485 U.S. 624, 630 n.3 (1988), quoting *West v. A.T. & T. Co.*, 311 U.S. 223, 237-38 (1940). It is

> "the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."

Fidelity Trust Co. v. Field, 311 U.S. 169, 177-78 (1940).

The federal courts here flatly disregarded these guiding principles laid down by this Court. The federal trial judge reviewed *Gomez v. Clark Equipment Co.*, 743 S.W.2d 429 (Mo. App. 1987), the most recent and clearest pronouncement by a Missouri appellate court of the law applicable to this case, and unabashedly pronounced that these three Missouri judges had simply misunderstood Missouri law.

Gomez is remarkably similar to the present case. In *Gomez* the operator of a lift truck crushed several fingers while maneuvering her truck. Her employer had modified the lift truck by removing the fuel tank supplied by the manufacturer and adding a larger tank, which obstructed the vision of the driver. The *Gomez* court fully reviewed Missouri law. It concluded that, in Missouri, if the modification of a product makes a safe product unsafe then the manufacturer is not liable, even if the modification was foreseeable. 743 S.W.2d at 432. The modification acts as a supervening cause which absolves the manufacturer of any liability. *Id.* The court made clear that

this issue is one for the court not the jury. The modification bars plaintiffs' claim as a matter of law. *Gomez*, 743 S.W.2d at 433; *see also Hales v. Green Colonial, Inc.*, 490 F.2d 1015, 1021 (8th Cir. 1974).

The federal trial judge here openly acknowledged that "*Gomez* is the last Missouri case which addresses this particular issue [modification]." App. B, *infra*, 6a. The judge nonetheless refused to apply the law of *Gomez* to the modification in this case. He examined the same cases that the three Missouri appellate judges examined in *Gomez*, and simply pronounced their analysis of Missouri law wrong:

> "While the *Vanskike* and *Hales* language is awkward using a double or triple negative, this Court is of the opinion that *Vanskike* and *Hales* hold that if the modification is foreseeable and if it is foreseeable that modification will make the product unsafe, then the manufacturer is not relieved from liability."

App. C, *infra*, 14a; *see also* App. B, *infra*, 6a.

A federal judge may not disregard a state appellate decision unless there is "persuasive data that the highest court of the state would decide otherwise." *Hicks*, *supra*, 485 U.S. at 630 n.3. No such data is present here. In the first place, the federal judge relied primarily on the federal cases quoted above to reject *Gomez*, not on Missouri law. Moreover, the three Missouri judges understood that the federal cases used confusing language. Indeed, the Missouri judges in *Gomez* reviewed and distinguished these very cases and their confusing language based on Missouri law. *Gomez*, 743 S.W.2d at 432-33.[1]

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[1] In *Hales v. Green Colonial, Inc.*, 490 F.2d 1015, 1020 (8th Cir. 1974), retailers sold a heater for use with natural gas. The retailers also supplied a conversion kit to modify the heater for use with LPG fuel. *Gomez* concluded that the modification of the heater using the kit was not a superseding cause, because modification for use with LPG fuel was intended by the retailer. S.W.2d 743 at 432-33.

Likewise in *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), removal of retaining

The Missouri appellate judges relied on Missouri law to determine how modification of a product is treated in Missouri.[2] The interpretation of Missouri law by these judges is sensible, rational and in complete keeping with the public policy of Missouri. Many state courts and legislatures have grown increasingly dissatisfied in recent years with the explosion of products liability lawsuits and the treatment of manufacturers as near insurers of their products.[3] The Missouri law set out in *Gomez* is fully defensible. But Missouri judges are not required to defend their interpretation of Missouri law to federal judges. A single federal judge cannot simply overrule and reject the reasoned analysis of Missouri law by three Missouri judges. That is exactly what happened here.[4] And by rejecting Missouri law, the federal judge denied Lear Siegler any access to its best defense under Missouri law. Federalism demands more.

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rings from a railroad car was not a superseding cause where there was evidence that the hitch was completely defective so that it could not hold the rings at all. *Gomez*, 743 S.W.2d at 443.

[2] *See Gomez*, 743 S.W.2d at 432-33 (discussion of *Jarrell v. Fort Worth Steel & Manufacturing Co.*, 666 S.W.2d 828, 835 (Mo. App. 1984), and *Duke v. Gulf & Western Manufacturing Co.*, 660 S.W.2d 404, 414 (Mo. App. 1983)).

[3] *See, e.g.*, 76 A.B.A. Journal 35 (Mar. 1990) (discussing the marked "decline in judicial receptivity to products cases"); 39 Defense L. J. 279 (1990). Missouri recently reformed its tort laws to lend additional protection to manufacturers. *See* L. 1987 H.B. No. 700 § C, effective July 1, 1987.

[4] The federal trial judge here suggested that *Gomez* was "contradictory to" *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. banc 1986). App. B, *infra*, 6a-7a. As stated above, the federal courts must follow state intermediate courts unless "persuasive data" compels a departure from that court. *Hicks, supra*, 485 U.S. at 630 n.3. The *Nesselrode* case did not deal with or discuss the modification of a product by a consumer. Nor did it discuss the concept of intervening cause. It provides no suport for the action of the federal court here. Certainly the *Gomez* court had access to the *Nesselrode* decision and the general statements of black letter law for products actions it contains.

Only one Missouri case, *Gomez*, deals directly with the issue of modification of a product by a consumer. Under *Gomez*, Lear Siegler is entitled to a determination as a matter of law on the issue of modification. Lear Siegler manufactured a grain auger that left its factory with safety shields intact. Kirby's employer removed these safety shields. Lear Siegler does not dispute that the shields were designed to be removable for various maintenance. Nonetheless, if the modification of this auger by removing critical safety shields was a supervening cause of injury, then Lear Siegler is not liable under any theory. The federal court here refused to even address the issue. Under its interpretation of Missouri law, Lear Siegler could not raise such a defense because the modification was foreseeable. App. C, *infra*, 14a ("The evidence in this case indicates that defendant foresaw and even observed farm equipment being operated with guard devices removed . . ."). Missouri law demands no such thing. Lear Siegler is entitled to a determination on the issue of modification, just as if it were in state court. A federal court has denied Lear Siegler this right. The court of appeals ruling is clearly wrong and should not be allowed to stand.

B. The Court of Appeals Error Raises Issues of Fundamental Importance

The decision of the federal courts here violates all of the principles of *Erie*. It will lead to inequitable administration of laws—one law in state court, the opposite in federal. It will encourage blatant forum shopping by Missouri plaintiffs lucky enough to meet diversity requirements. And perhaps most egregious, it will allow a single federal judge to overrule three Missouri appellate judges and their interpretation of Missouri law. This Court should not condone such blatant disregard for our federalism.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment below should be summarily reversed or the case should be set for briefing and argument.

Respectfully submitted,

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March 13, 1991

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1410

RANDALL SCOTT KIRBY,
Appellee,

v.

LEAR SIEGLER, INC.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: October 10, 1990

Filed:

Before LAY, Chief Judge, BRIGHT and TIMBERS,* Senior Circuit Judges.

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* The HONORABLE WILLIAM H. TIMBERS, Senior Circuit Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

PER CURIAM.

Lear Siegler, Inc., appeals from the district court's [1] order in this diversity case denying its motion for judgment notwithstanding the verdict and alternative motion for a new trial. We construe the appeal as taken from the final judgment on the jury verdict. *See McGowne v. Challenge-Cook Bros. Inc.*, 672 F.2d 652, 658-59 (8th Cir. 1982). Randall Kirby injured his left arm while using a grain auger manufactured by Lear Siegler, and the jury awarded him $500,000 on a theory of strict products liability. After carefully reviewing the record and hearing oral argument, we find no prejudicial error of law or fact. We affirm the judgment of the district court on the basis of its well-reasoned opinion. *See* 8th Cir. R. 47B.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

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[1] The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 87-3657-CV-S-4

RANDALL SCOTT KIRBY,
Plaintiff,

vs.

LEAR SIEGLER, INC.,
Defendant.

ORDER

[Filed Feb. 6, 1990]

On December 14, 1989 following a jury verdict, judgment was entered in favor of plaintiff and against defendant in the amount of $500,000.00.

On December 26, 1989 defendant filed a motion for judgment notwithstanding the verdict and an alternative motion for a new trial. While defendant's motions were filed on the 12th day after entry of judgment, the motions were timely filed in that the 10th day was a Sunday and the 11th day was Christmas Day. (F.R.C.P. 6).

Very briefly the facts are as follows: Plaintiff was an employee of Empire Seed Company and was employed at Rogers, Arkansas. At the time of his injury he was engaged in transporting fescue seed from his employer's warehouse in Monett, Missouri to Arkansas. At the time of the injury he was using a grain auger manufactured

by defendant to load a grain trailer from seed which was stored in the employer's warehouse. The auger was powered by the power take off of a farm tractor. The auger became clogged and a coupler broke. The plaintiff stopped the auger, removed the covering from the clean out hole and pulled a handful of cheesecloth out of the auger. He then repaired the coupler using a bolt and restarted the auger. After restarting the auger he reached over the top of it and the unguarded rotating shaft to attempt to slide the cover back over the clean out hole. His shirtsleeve and arm were pulled into the drive shaft inflicting severe injuries to his arm.

When the auger left the manufacturer there were shields or guards over the drive shaft; however, at the time of plaintiff's injury, these guards had been removed. The guards were attached to the auger by means of screws and were removable. As a matter of fact at least one guard had to be removed in order to grease the auger. At the time of plaintiff's injuries the guards which had been installed by the manufacturer at the intake part of the auger had been removed and a modified guard installed in its place. Also near the intake portion of the auger the manufacturer had placed a warning that the auger should not be used without the guards in place; however, this warning had become obliterated and worn away long before plaintiff was injured. There was no warning on the guards themselves and particularly no warning in the area where plaintiff was working when his arm got caught by the drive shaft.

The case was submitted to the jury on a strict liability products theory that the auger was defective and unreasonably dangerous when put to a reasonably anticipated use and that it was unreasonably dangerous due to defendant's failure to give an adequate warning of the danger. A contributory fault instruction was given on behalf of defendant. In the plaintiff's verdict directing instructions the jury was told that they could find in

favor of plaintiff if the defect "directly caused or directly contributed to cause damage to plaintiff."

The standard for granting a directed verdict and a judgment notwithstanding the verdict are the same under federal law. A directed verdict should be granted only when all the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party. *Dill* v. *Janklow*, 828 F.2d 481 (8th Cir. 1987). The evidence must be viewed in the light most favorable to the nonmoving party and the Court must assume that all conflicts in the evidence were resolved in plaintiff's favor and must assume as proven all facts which plaintiff's evidence tended to prove. *Sunkyong International, Inc.* v. *Anderson Land and Investment Company*, 828 F.2d 1245 (8th Cir. 1987). The authority to grant a new trial however is confined almost entirely to the exercise of discretion on the part of the trial court. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 191, 66 L.Ed.2d 193 (1980). A trial court may grant a new trial for the reason that the jury verdict is against the weight of the evidence. In making such a determination the trial court may makes its own evaluation of the evidence, may weigh the evidence, may disbelieve witnesses and grant a new trial even where there is substantial evidence supporting the jury verdict. *Brown By Brown* v. *Syntex Laboratories, Inc.*, 755 F.2d 668 (8th Cir. 1985); and *Ouachita National Bank* v. *Tasco Corporation*, 686 F.2d 1291 (8th Cir. 1982).

In the motion for judgment notwithstanding the verdict, defendant contends that there was not sufficient evidence to make a submissible case that the auger at the time of manufacture and sale was in a defective condition, unreasonably dangerous when put to a reasonably anticipated use, whether such claim was based upon a defect in design or on the inadequacy of the warning. Defendant further contends that the evidence failed to

disclose that the auger was being used in a manner reasonably anticipated and that it had been modified by removal of the drive shaft guards, enlargement of the guard at the intake of the auger and by replacement of roll pins and bolts in the drive shaft couplers.

There was sufficient evidence for the jury to find that defendant knew that many farmers used the auger with the drive shaft guards removed and also that it was a common practice to replace the roll pins in the couplers with bolts. There was also evidence that even with the intake guard furnished with the auger by defendant it had on occasion become clogged which necessitated the removal of the drive shaft guards in order to unclog the auger. The only real issue in defendant's motion is whether there had been such modification in the auger to relieve the defendant of any liability. In this regard defendant relies on the case of *Gomez* v. *Clark Equipment Co.*, 473 S.W.2d 429 (Mo. App. 1987) which in interpreting language in *Vanskike* v. *ACF Industries, Inc.*, 665 F.2d 188, 195 (8th Cir. 1981) concluded that "if the modification is foreseeable but the modification makes a safe product unsafe, the manufacturer is not liable." *Gomez* is the last Missouri case which addresses this particular issue. However in denying defendant's motion for summary judgment in an order issued November 2, 1989, this Court ruled that the *Gomez* court misinterpreted the *Vanskike* language. In *Vanskike* it was stated: "Subsequent changes or alterations in the product do not relieve the manufacturer of strict liability if the changes were foreseeable and the changes did not unforeseeably render the product unsafe." *Id.* at 195.

A correct interpretation of that language would be that the manufacturer is not relieved from liability if the modification is foreseeable and if it could have been foreseen that such modification would create a hazard. In this Court's opinion the *Gomez* statement of Missouri law is inconsistent with and contradictory to the law as

expressed in *Nesselrode* v. *Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. banc 1986) where the court stated that the concept of reasonably anticipated use includes misuse and abnormal use which is objectively foreseeable. The *Nesselrode* court also stated that underneath the conceptual umbrella of proximate cause can be found the concepts of misuse, abnormal use, reasonably anticipated use, and contributory fault. The court concluded that the manufacturer of the actuators could have reasonably anticipated that Executive would make an abnormal use of the actuators.

In *Bhagvandoss* v. *Beiersdorf, Inc.*, 723 S.W.2d 392 (Mo. banc 1987) the court stated that a product may be unreasonably dangerous and defective even though it would not have caused injury when used properly if the actual use is one reasonably anticipated by the manufacturer.

Without belaboring the issue as to whether a manufacturer is relieved from liability if the modification makes a safe product unsafe, it is the opinion of the Court that defendant is not entitled to a judgment notwithstanding the verdict. The drive shaft guards were designed so that they could be removed and in certain circumstances had to be removed. Therefore, in this regard there was no modification in the design of the guards. Since the guards were designed to be removed, the mere failure to replace them upon removal does not constitute such a modification as to relieve the manufacturer of liability. The same can be said for substitution of bolts for roll pins in the couplers.

The only warning placed on the auger by the manufacturer to not use it without the drive shaft guards in place was located near the intake section of the auger. This was several feet from the point where plaintiff suffered his injury. In addition this warning had been worn away or completely obliterated long before plaintiff's injury. The place where the injury occurred was

at a point where the manufacturer knew that it would be most likely required that a guard would be removed in order to unclog the machine, grease the drive shaft or to replace coupler pins. It was clearly a jury issue as to whether failure to place a warning in this specific area rendered the product unreasonably dangerous. The auger was being used to load grain which was the very use for which it was manufactured and thus it was an anticipated use. In addition there was evidence that defendant knew that augers were used with the guards removed and also knew that bolts were frequently substiuted for roll pins. Defendant's motion for judgment notwithstanding the verdict will be denied.

In the alternative to its motion for judgment notwithstanding the verdict, defendant has moved for a new trial. It set forth numerous issues for which it claims a new trial would be appropriate. It alleges that there was insufficient evidence for the submission of Instruction No. 5, plaintiff's verdict directing instruction. The Court has addressed this issue in denying defendant's motion for judgment notwithstanding the verdict and will not address it further. The defendant also alleges that there was insufficient evidence to submit Instruction No. 7, plaintiff's verdict directing instruction, on the issue of inadequate warning. The basis for this instruction is that the danger confronting plaintiff was open and obvious and therefore defendant had no duty to warn.

In a products liability case plaintiff's contributory negligence is not an issue. *Ponte* v. *Harley Davidson Motor Co.*, 732 S.W.2d 561 (Mo. banc 1987). For contributory fault to be a defense it must be shown that the user discovered the defect and was aware of the danger but nevertheless proceeded unreasonably to make use of the product and was injured by it. *White* v. *Thompsen Concrete Pump Company*, 747 S.W.2d 655 (Mo. App. 1988). Defendant relies on *Haines* v. *Powermatic Houdaille, Inc.*,

661 F.2d 94 (8th Cir. 1981) as support for its position. That case merely holds that it was not error for the trial court to give a contributory fault instruction. One was given in this case. The issue was one for the jury which was decided adversely to defendant.

Defendant also claims that it is entitled to a new trial as a result of the Court not admitting the admission by plaintiff made to his employer Royal Carnes that the accident was his fault. At the time the statement was made the evidence discloses that plaintiff was under heavy sedation and was in severe pain. It was not a statement concerning a fact but at most was a conclusion. Obviously the plaintiff did not know the law concerning strict liability. He may have felt that he was contributorily negligent which would not be a defense.

Defendant also alleges that it is entitled to a new trial because of the admission of the testimony of plaintiff's economic expert Larry G. Cox. The testimony of Mr. Cox set forth the average earnings of a high school graduate and it was not restricted by the work history of plaintiff; however, it is clear that the jury did rely upon Mr. Cox's testimony in returning his verdict. Any error in permitting the testimony of Mr. Cox was at the worst, harmless error.

Defendant also contends that it is entitled to a new trial because of the admission of evidence concerning prior accidents. These accidents involved an unguarded rotating shaft which was the hazard presented in the instant case. In addition this evidence was admissible to show that defendant knew that such machines were being operated by users without the benefit of a guard.

Defendant also bases its motion on the admission of opinion testimony by experts concerning the inadequacy of warnings, foreseeability, unreasonable danger and defectiveness on the basis that such testimony invades the province of the jury. Under Fed.R.Evid. 704(a) such

testimony is not objectionable on the basis that it invades the ultimate issue to be decided by the trier of fact.

Defendant also alleges that it is entitled to a new trial because of the admission concerning designs and warnings offered by another manufacturer, Mayrath, some ten years after the auger in issue was manufactured. The designs and warnings incorporated in Mayrath's product were well known in the engineering field prior to the manufacture of the auger in this case. This testimony was helpful to the jury in determining whether the product in question was defective and whether there was an adequate warning.

Plaintiff testified that while he knew he should not touch the rotating shaft, he was not aware that there was a danger of a protrusion on the shaft catching his shirt and thus wrapping his arm around the rotating shaft. He also testified that had there been a warning he would have abided by it.

As stated above in denying the defendant's motion for judgment notwithstanding the verdict, the only warning placed on the equipment was completely obliterated long before plaintiff's injury. These issues were properly submitted to the jury and found by the jury against defendant.

It is

ORDERED that defendant's motion for judgment notwithstanding the verdict is denied; and it is further

ORDERED that defendant's alternative motion for a new trial is denied.

/s/ Russell G. Clark
RUSSELL G. CLARK
Judge
United States District Court

Date: February 6, 1990

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 87-3657-CV-S-4

RANDALL SCOTT KIRBY,
Plaintiff,

VS.

LEAR SIEGLER, INC.,
Defendant.

ORDER

[Filed Nov. 2, 1989]

Defendant has moved for summary judgment on Count I of plaintiff's complaint. Count I alleges strict liability by reason of defendant's manufacture of a defective grain auger.

There are well settled principles in ruling a motion for summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact present in the case and judgment should be awarded to the party seeking the motion as a matter of law. *Percival* v. *General Motors Corporation*, 539 F.2d 1126, 1129 (8th Cir. 1976). However, because summary judgment remedy is drastic, it should not be granted unless the moving party has established the right to a judgment with such clarity that there is no room for controversy. *Jewson* v. *Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). In addition, the party opposing summary judgment motions may not rest upon the allegations in their pleadings. The non-

movant must resist the motion by setting forth specific facts showing there is a genuine issue of fact for trial. Fed.R.Civ.P. 56(e); *Burst* v. *Adolph Coors Company*, 650 F.2d 930, 932 (8th Cir. 1981). In *Green* v. *United States Dept. of Labor*, 775 F.2d 964, 973 (8th Cir. 1985), the Court stated that such a motion is to be viewed in the light most favorable to the opposing party who also must receive the benefit of all reasonable inferences obtainable from the material before the Court. In *Butler* v. *MFA Life Ins. Co.*, 591 F.2d 448 (8th Cir. 1979), the Court held that summary judgment should not be granted unless the moving party has established his right to judgment with such clarity that no room for controversy remains and has demonstrated that the nonmoving party is not entitled to recover under any discernible circumstances.

In ruling a motion for summary judgment, the Court does not decide material factual issues, rather it determines whether or not they exist. *Columbia Union National Bank* v. *Hartford Accident and Indemnity Co.*, 669 F.2d 1210 (8th Cir. 1982). Summary procedures are appropriate where the issues for resolution are primarily legal rather than factual. *Lomar Wholesale Grocery, Inc.* v. *Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 707 (1988). Issues of fact must be material to a resolution of the dispute between the parties; where the only disputed issues of fact are immaterial to the resolution of the legal issues, summary judgment is appropirate. *Lomar*, 824 F.2d at 585.

With these standards in mind, the Court will proceed to consider defendant's motion for summary judgment.

Very briefly, the facts are as follows: Plaintiff was an employee of Empire Seed Company and was employed at Rogers, Arkansas. At the time of his injury he was engaged in transportation of fescue seed from his employer's warehouse in Monett, Missouri to Rogers, Ar-

kansas. At the time of his injury he was using the grain auger manufactured by defendant to load a grain trailer. The auger became clogged and a coupler broke. Plaintiff stopped the auger, removed the cover from the clean-out hole and pulled a handfull of cheese cloth out of the auger. He then repaired the coupler using a bolt and restarted the auger. After restarting the auger he reached over the top of the auger and the unguarded, rotating drive shaft to attempt to slide the cover back over the clean-out hole. His shirt sleeve and arm were pulled into the drive shaft, injuring him. When the auger left the manufacturer there were shields or guards over the drive shaft; however, at the time of his injury, these guards had been removed. Defendant contends that by removal of the guards there was such a material change in the auger as manufactured by it to relieve it of liability as a matter of law.

The parties agree that the substanitve law of Missouri applies in this case. They also agree that the essential elements of a strict liability case are as follows: (1) the defendant sold or manufactured the grain auger in the course of its business; (2) the grain auger was then in a defective condition unreasonably dangerous when put to a reasonably expected use; (3) the grain auger was used in the manner reasonably anticipated; and (4) plaintiff was damaged as a result of the defective condition that existed *when the grain auger was sold.*

In support of its motion for summary judgment defendant relies on only one Missouri case: *Gomez* v. *Clark Equipment Co.*, 743 S.W.2d 429 (Mo. App. 1987). In *Vanskike* v. *AFC Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981) the court stated:

> [S]ubsequent changes or alterations in the product do not relieve the manufacturer of strict liability if the changes were foreseeable and the changes did not unforeseeably render the product unsafe.

Substantially the same language appears in *Hales* v. *Green Colonial, Inc.*, 490 F.2d 1015, 1020 (8th Cir. 1974). *Gomez* interprets the *Vanskike* and *Hales* language to hold:

> If a modification is foreseeable but the modifications make a safe product unsafe the manufacturer is not liable.

While the *Vanskike* and *Hales* language is awkward using a double or triple negative, this Court is of the opinion that *Vanskike* and *Hales* hold that if the modification is foreseeable and if it is foreseeable that the modification will make the product unsafe, then the manufacturer is not relieved from liability.

The evidence in this case indicates that the defendant foresaw and even observed farm equipment being operated with guard devices removed and thus could foresee that the auger which injured plaintiff would be used with the guard shields removed. Since the guard shields were removable, this Court is of the opinion that it becomes a jury issue as to whether this constituted a material modification of the auger. A jury might very well determine that operation of the auger without the shields was nothing more than a misuse of the product. In *Jarrell* v. *Fort Worth Steel and Manu. Co.*, 666 S.W.2d 828 (Mo. App. 1984) the court held that where there is both a design defect and a misuse of the product each of which contributes to the accident, the misuse does not become an intervening cause if the misuse was foreseeable. Plaintiff contends that the danger could have been eliminated by various design changes in the product. It is a jury issue as to whether failure to make one or more of these possible changes rendered the product defective at the time of its manufacture and its sale. There are genuine issues of fact which are disputed in this case which make granting defendant's motion for summary judgment on Count I inappropriate.

It is

ORDERED that defendant's motion for summary judgment on Count I of plaintiff's complaint is denied.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: November 2, 1989

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1410WM

RANDALL SCOTT KIRBY,
Appellee,

v.

LEAR SIEGLER, INC.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Appellant's petition for rehearing has been considered by the court and is denied.

December 13, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

(2)

No. 90-1452

Supreme Court, U.S.
FILED
APR 3 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LEAR SIEGLER, INC., a Delaware Corporation,
Petitioner,

v.

RANDALL SCOTT KIRBY,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal District Court and the Eighth Circuit Court of Appeals in this diversity case appropriately applied well-settled principles of Missouri strict products liability substantive law to the facts in this case.

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A. There was no violation of the *Erie* doctrine and the principles of federalism incorporated therein, because the federal courts carefully reviewed, analyzed, interpreted and applied Missouri substantive law to the facts in this case, which is what *Erie* requires 8

B. Petitioner is merely dissatisfied with the lower courts' determination as to what Missouri substantive law is, and Petitioner simply seeks through certiorari this Court's review of Missouri state law, which is not an issue of fundamental importance 10

II. THE LOWER COURTS PROPERLY APPLIED WELL-ESTABLISHED MISSOURI SUBSTANTIVE LAW TO THE FACTS IN THIS CASE, IN THAT: 11

A. Missouri courts consistently recognize manufacturers cannot escape liability for defectively designed products when the product is being used in a manner reasonably anticipated, even though such use is not intended by the manufacturer 11

B. Kirby's evidence was that the auger "design" (even with the guards) was defective and unreasonably dangerous when put to a reasonably anticipated use, in that: (1) the operation of the auger required the guards to be periodically removed; (2) the guards were fully detachable when removed; (3) expert testimony corroborated by engineering literature established the foreseeability that guards removed for necessary operations will not be replaced; and (4) there were feasible alternative designs that would minimize the risk that the auger would be operated without the guards in place 18

C. *Gomez* is not the "controlling state court decision," but only one of several decisions carefully reviewed by the lower courts . . . 22

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STATEMENT OF THE CASE

Respondent Kirby is dissatisfied with the Statement of the Case reported by Lear Siegler, Inc., in its Petition. To understand the lower courts' rulings, a thorough understanding of Kirby's evidence is necessary. Many evidentiary facts are omitted regarding: (1) design and operation of the auger; (2) the design and operation of the auger drive shaft guards; and (3) the anticipated use of the auger with the drive shaft guards removed. Certain procedural matters equally critical to understanding the lower courts' rulings were also omitted. Therefore, in compliance with Supreme Court Rules 15.1 and 24.2, the following evidentiary facts are provided in order to supplement Petitioner's Statement of the Case.

A. The Design and Operation of the Portable Grain Auger

The machine that injured Kirby was a Hutchinson Century Model 51-foot long, 10-inch diameter portable grain auger manufactured and sold in 1979 by Petitioner Lear Siegler, Inc. The auger was used by Kirby's employer to move grass seed from the warehouse floor in a storage facility into a trailer for transportation. The auger carries the seed through a 10-inch diameter housing by means of a rotating corkscrew flighting inside the housing. The corkscrew flighting is powered by a drive shaft located on the top of the housing along the entire length of the auger. The drive shaft is PTO-driven and rotates at a rate of approximately 500 rpm. Sections of the drive shaft are connected by couplers secured by shear pins. The auger is designed so that a pin will shear in the event of overloading. This protects the rest of the power system.

The corkscrew flighting inside the auger was supported by three internal bearings located inside the housing at various intervals. These internal bearings were also located underneath the top drive shaft. Access to the internal bearings was necessary for service and

maintenance. Additionally, access was necessary because the internal bearings created obstructions in the flighting causing the auger to clog. The first of the three internal bearings is the most likely location where the auger will clog. Since the auger has no reversing mechanism, access must be gained to this internal bearing in order to remove material clogging the auger.

Access to the internal bearings is gained through "inspection holes." These inspection holes are located on top of the auger housing, directly underneath the top drive shaft. The first inspection hole is covered by a metal "sleeve" that surrounds the auger housing. To gain access to the internal bearing, the guard over the top drive shaft must be removed and then the operator must slide back the sleeve that covers the inspection hole. To accomplish this, the operator normally reaches over the drive shaft in order to grasp each side of the sleeve.

B. Design and Operation of the Top Drive Shaft Guard

The auger was manufactured and sold with metal guards over the drive shaft. These guards were sheet metal and came in approximately five-foot sections. They were attached to the auger with screws at each end of the guard. Witnesses described them as "cumbersome with sharp edges." In order to remove the guard, the operator must use a tool (a screwdriver or wrench) to remove the screws from each end. Once removed, the guard is completely detached from the auger. To replace the guard, the operator must use a tool to reinsert the screws at each end of the guard. This removal and replacement process takes approximately five minutes.

The evidence was that, during ordinary operation of the auger, the guards over the lower sections of the top drive shaft had to be removed for a variety of reasons. These included:

1. To gain access to the inspection hole in order to perform necessary maintenance on the internal bearings.

2. To gain access to the inspection hole in order to remove objects caught on the internal bearing which, in effect, obstructs the pathway of moving material through the corkscrew flighting.

3. To replace shear pins in the drive shaft coupler which sheared when the auger:

   (a) clogged from foreign objects caught on the internal bearings;

   (b) was started under load; and

   (c) became overloaded.

4. To reach the grease zerk located near each inspection hole which required lubrication once every ten hours of operation.

Furthermore, Petitioner's corporate representative admitted that removal of the drive shaft guards was completely foreseeable to the manufacturer and was not a misuse of the product.

C. The Accident

Kirby had worked for his employer approximately two months prior to the accident. He was primarily a truck driver who hauled truckloads of seed back and forth between his employer's warehouses. Prior to the date of the accident, Kirby had worked around the auger only under the supervision of a senior employee. However, on the day of the accident, he was, for the very first time, the person placed in charge of operating the auger.

During the course of operating the auger, Kirby noticed the auger had clogged. He turned off the tractor powering

the auger in order to remove the clog from the inspection hole. The metal guards over the drive shaft had been removed by Kirby's employer prior to his employment. At the time he was injured, Kirby was not aware of the existence of guards that were supposed to cover the drive shaft.

After Kirby cleaned the clog out of the auger, he started the tractor which engaged the PTO. The sleeve over the inspection hole was left open in order for Kirby to see that grain was moving up the auger. Once this was evident, Kirby climbed off the tractor in order to close the inspection hole. This procedure was done with the power on in order to reduce the risk of shearing a pin in the drive shaft by restarting the auger under full load. To close the inspection hole, Kirby reached over the rotating drive shaft in order to grasp the sleeve and push it over the inspection hole. This method was followed by Kirby's co-employees as well.

Before Kirby could close the inspection hole, the rotating drive shaft grabbed his shirt sleeve, pulling his left arm and body into the auger. He was unable to pull away until his shirt was ripped from his body. He suffered severe and permanent injuries to his left arm and hand requiring six surgeries and three hospitalizations. According to his physician, his left upper extremity is 66% permanently disabled.

D. Kirby's Claims at Trial

Kirby claimed that the auger, when designed, manufactured and sold, was defective and unreasonably dangerous when used in a manner reasonably anticipated by the manufacturer. Kirby's theory of the case was that the designed guarding system was inadequate and defective at the time the auger was sold because:

(1) it was foreseeable and necessary for the top drive shaft guards to be removed for ordinary operation of the auger;

(2) use of the auger without the guards in place was foreseeable to the manufacturer and an anticipated use of the auger;

(3) with the guards removed the exposed drive shaft, which rotated at approximately 500 rpm, presented a substantial risk of serious injury to the operator and bystanders; and

(4) numerous design alternatives were available at the time the auger was manufactured that would have eliminated and/or substantially minimized the risk that the auger would be operated without the guards covering the rotating drive shaft.

Kirby presented substantial evidence at trial supporting his theory of the case which justified the district court's submission of his claim to the jury.

E. Proceedings in the Courts Below

The issue now raised by Petitioner was first presented to the district court in Petitioner's Motion for Partial Summary Judgment. Petitioner claimed that the removal of the drive shaft guards was a legally significant modification that rendered the auger unsafe and thereby excused Petitioner's liability under the Missouri Court of Appeals' decision in *Gomez v. Clark Equipment Co.*, 743 S.W.2d 429 (Mo.App. 1987). Accompanying its motion, Petitioner filed ten pages of suggestions supporting its interpretation of Missouri law. In response, Kirby filed 22 pages of written Suggestions in Opposition to Petitioner's motion. Kirby's suggestions discussed not only the *Gomez* decision, but also (1) eight additional Missouri state court opinions that address the issues of manufacturer's liability for not only foreseeable uses, but also for foreseeable misuses of its product; (2) the most recent Eighth Circuit Court of Appeals' decision addressing this issue under Missouri law; and (3) a comprehensive statement of the evidence supporting Kirby's theory of his case. Considering all of the applicable Missouri opinions and

Kirby's evidence, the district court overruled Petitioner's Motion for Partial Summary Judgment.

The issue was next raised in Petitioner's Motion for Judgment Notwithstanding the Verdict. The district court's Order overruling this motion again carefully considered Missouri law. In its Order, the district court discussed the Missouri Supreme Court opinions of *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. banc 1986), and *Bhagvandoss v. Biersdorf, Inc.*, 723 S.W.2d 392 (Mo. banc 1987), which both held manufacturers liable for misuses of their products which were "reasonably anticipated" by the manufacturers. The district court concluded that since the auger was designed so that the guards must be removed, the failure to replace them following removal "does not constitute a modification as to relieve the manufacturer of liabiiity." (Lear Siegler's Petition, page 7A.)

The issue was next raised before a three-judge panel in the Eighth Circuit Court of Appeals. The issue of the applicable Missouri law was again briefed by both parties. Additionally, the case was argued orally before the panel. Against this background, the Eighth Circuit Court of Appeals issued a *per curiam* opinion stating, "After carefully reviewing the record and hearing oral argument, we find no prejudicial error of law or fact. We affirm the judgment of the district court on the basis of its well-reasoned opinion." (Lear Siegler's Petition, pages 1A and 2A.)

SUMMARY OF ARGUMENTS AGAINST GRANTING WRIT

This is not a proper case for certiorari to the Supreme Court for several reasons. First, the lower federal courts did not violate the well-established principles of federalism set forth in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. Moreover, the lower federal courts were provided extensive briefs and heard argument

of counsel concerning application of Missouri law to the facts in this case. There is every indication that the federal judges carefully considered the arguments presented to them. They concluded that use of the auger with the guards removed was a reasonably anticipated use based on the evidence and Missouri law. This is precisely what the *Erie* doctrine requires -- ascertainment of the state law applicable to the facts of the case. Petitioner is using the *Erie* doctrine as a bootstrap to obtain an additional forum to hear its argument as to what Missouri substantive law is -- an argument that has been rejected by four federal judges who study and work with Missouri substantive law on a regular basis. Furthermore, Petitioner raises no issue that otherwise satisfies the considerations governing review on Writ of Certiorari set forth in Supreme Court Rule 10.1.

In any event, the results reached by the four federal judges that reviewed this issue are consistent with and fully supported by numerous decisions by the Missouri Supreme Court and Court of Appeals. Under the doctrine of strict products liability, Missouri cases have long recognized that a manufacturer is liable for design defects that result from the anticipated use of its product. *Bhagvandoss v. Biersdorf, Inc.*, 723 S.W.2d 392, 396 (Mo. banc 1987); *Fahy v. Dresser Industries, Inc.*, 740 S.W.2d 635, 637-38 (Mo. banc 1987); *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 381 (Mo. banc 1986). These Missouri Supreme Court opinions all recognize that a manufacturer may be liable even though the product would not have caused injury when used properly, if the use which caused the injury was reasonably anticipated by the manufacturer.

Kirby's theory of the case focused on the defective and unreasonably dangerous "design of the auger" when manufactured and sold with fully detachable guards that were cumbersome and time-consuming to remove, but nevertheless had to be removed frequently during the ordinary operation of the auger. Moreover, the removal and nonreplacement of the drive shaft guards is the very

"anticipated use" for which a manufacturer can be held liable under the aforementioned Missouri case law. Kirby presented substantial evidence to support his theory of the case.

Finally, Petitioner relies on *Gomez v. Clark Equipment Co.*, 743 S.W.2d 429 (Mo.App. 1987), in a vacuum, which is extremely misleading. When considered in light of other Missouri cases addressing the same issue, *Gomez* does not dictate a different result in the present case.

ARGUMENT

(Answering Petitioner's Point 1B)

I. THIS IS NOT A PROPER CASE FOR CERTIORARI TO THE UNITED STATES SUPREME COURT BECAUSE:

A. There was no violation of the *Erie* doctrine and the principles of federalism incorporated therein, because the federal courts carefully reviewed, analyzed, interpreted and applied Missouri substantive law to the facts in this case, which is what *Erie* requires.

There is no dispute that the *Erie* doctrine and its progeny required the federal district court in this diversity action to apply Missouri substantive law. Similarly, there can be no legitimate dispute that the district court and the court of appeals in fact did apply Missouri substantive law to the facts in this case. The district court judge reviewed briefs that discussed, analyzed and argued application of Missouri law to the facts in this case. Similarly, the three-judge court of appeals panel reviewed briefs and heard argument of counsel which discussed, analyzed and argued application of Missouri law to the facts in this case.

Furthermore, the district court, through his presence during the trial, and the court of appeals, through the thorough, detailed statement of facts contained in the

thorough, detailed statement of facts contained in the briefs of counsel as well as their oral arguments, were eminently familiar with the theory of Kirby's case and the evidence supporting his theory. In its order overruling Petitioner's Motion for J.N.O.V., the district court discussed two Missouri Supreme Court *en banc* decisions, which clearly recognize that the concept of "reasonably anticipated use" (1) includes misuse and abnormal use which is objectively foreseeable; and (2) allows recovery for injury which would not have occurred had the product been used properly when the misuse is foreseeable (Lear Siegler's Petition, page 7A, citing and discussing *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. banc 1986) and *Bhagvandoss v. Biersdorf, Inc.*, 723 S.W.2d 392 (Mo. banc 1987)). Based on its knowledge of Kirby's theory, the evidence and Missouri substantive law, the district court concluded that there was substantial evidence that use of the auger with the guards removed was foreseeable and could be reasonably anticipated by the manufacturer.

On appeal, the three-judge panel similarly reviewed Missouri law in connection with the evidence in this case and reached the same conclusion as the district court. Moreover, the court of appeals commended the district court's application of the law to the facts in this case stating, "We affirm the judgment of the District Court on the basis of its well-reasoned opinion." (Lear Siegler's Petition, page 2A.) Accordingly, there is every indication the district court's application of Missouri law to the facts in this case was proper.

B. Petitioner is merely dissatisfied with the lower courts' determination as to what Missouri substantive law is, and Petitioner simply seeks through certiorari this Court's review of Missouri state law, which is not an issue of fundamental importance.

In the lower courts, Petitioner took the position that *Gomez* repudiated the theory that a "foreseeable misuse" could constitute an anticipated use by the manufacturer. This argument was rejected by the lower courts on the basis that it was inconsistent with and clearly contrary to the recent Missouri Supreme Court decisions of *Nesselrode* and *Bhagvandoss*. Dissatisfied with its results in the lower courts, Petitioner now seeks through writ of certiorari yet another forum to argue its interpretation of Missouri substantive law.

While an important issue to the parties in this case, this Court's interpretation and application of Missouri state law to this case does not rise to the level of fundamental importance necessary to invoke the discretionary jurisdiction of this Court. This issue is no different than interpretation and application of any state's law to the facts in any particular case. In the present case, this very determination was made by the district court, and was reviewed and affirmed by the court of appeals.

Moreover, this Court on numerous occasions has recognized the superior position of the lower courts to determine questions of state law due to their familiarity with the intricacies and trends of local law and practice.[1]

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1 See Commissioner v. Bosch, 387 U.S. 456, 462 (1967) ("The issue presents solely a question of state law and '[w]e ordinarily accept the determination of local law by the court of appeals . . . and we will not disturb it here.'"); Runyon v. McCrary, 427 U.S. 160, 181 (1976) ("The court has accepted the interpretation of state law in which the district court and the court of appeals have concurred even if an examination of the state law issue without such guidance may have justified a different conclusion."); Bishop v. Wood, 426 U.S. 341, 345-46 (1976) (holding the same and refusing to overturn district court's interpretation of a North Carolina state statute); and Hillsborough Township v. Cromwell, 326 U.S. 620, 629-30 (1945) (in refusing to overrule the district court's interpretation of (continued...)

With their familiarity with Missouri law, the district court and court of appeals judges were certainly qualified to determine and apply Missouri law to the facts in this case. Finally, the issue raised by Petitioner does not otherwise satisfy the considerations governing review of writ of certiorari set forth in Supreme Court Rule 10.1.

For these reasons, the issue raised by Petitioner does not rise to the level of fundamental importance warranting imposition of the discretionary jurisdiction of this Court through writ of certiorari. Accordingly, Petitioner's Writ should be denied.

(Answering Petitioner's Point 1A)

II. THE LOWER COURTS PROPERLY APPLIED WELL-ESTABLISHED MISSOURI SUBSTANTIVE LAW TO THE FACTS IN THIS CASE, IN THAT:

A. Missouri courts consistently recognize manufacturers cannot escape liability for defectively designed products when the product is being used in a manner reasonably anticipated, even though such use is not intended by the manufacturer.

Under Missouri law, the essential elements of a strict liability case, as applied in this case, are:

(1) the defendant sold or manufactured the auger in the course of its business;

(2) the auger was in a defective condition, unreasonably dangerous when put to a reasonably expected use;

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[1](...continued)
applicable New Jersey law, this Court held, "On such questions, we pay great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice.'").

(3) the auger was used in the manner reasonably anticipated; and

(4) plaintiff was damaged as a direct result of a defective condition that existed when the auger was sold.

Fahy v. Dressler Industries, Inc., 740 S.W.2d 635, 637-38 (Mo. banc 1987). *See also*, Missouri Approved Instruction 25.04. These elements were set forth in the district court's order denying Petitioner's Motion for Summary Judgment (Lear Siegler's Petition, page 13A). Therefore, the district court was clearly aware that for Kirby to make a submissible case under Missouri law he must present substantial evidence that: (1) the auger was defective and unreasonably dangerous at the time it was sold (with the guards); and (2) the auger was being used at the time Kirby was injured (without the guards) in a manner reasonably anticipated by the manufacturer.

Review of Missouri case law makes one thing evident -- Petitioner's liability is determined by the "reasonably anticipated use" of its product, rather than Petitioner's subjective intention about how it should be used. "The test of whether a product is defective when sold is whether the product is unreasonably dangerous to a consumer or user *given the conditions and circumstances that will foreseeably attend the use of the product.*" *Jarrell v. Fort Worth Steel and Manu. Co.*, 666 S.W.2d 828, 836 (Mo.App. 1984) (emphasis added). The reasonably anticipated use of a product encompasses all of its "objectively foreseeable uses, including foreseeable uses which the manufacturer might consider a misuse of its product." *Nesselrode*, 707 S.W.2d at 381 (concept of reasonably anticipated use includes misuse and abnormal use which is objectively foreseeable). *See also, Rogers v. Toro Manu. Co.*, 522 S.W.2d 632, 637-38 (Mo.App. 1975) (concept of reasonably anticipated use includes misuse and abnormal use which is objectively foreseeable); *Higgins v. Paul Hardeman, Inc.*, 457 S.W.2d 943, 948 (Mo. App. 1970) (foreseeble use may

be different from intended use, and include any particular use which should be known to a reasonably prudent manufacturer). For example, involvement of an automobile in a collision is a reasonably anticipated use of a product, even though it is not the intended use of the product. *See Cryts v. Ford Motor Co.*, 571 S.W.2d 683, 688 (Mo. App. 1978). Under the concept of reasonably anticipated use, reduced to its simplest terms, the Missouri Supreme Court has stated, "[a] product may be unreasonably dangerous and defective even though it would not have caused injury when used properly, if the actual use is one reasonably anticipated by the manufacturer." *Bhagvandoss v. Biersdorf, Inc.*, 723 S.W.2d 392, 396 (Mo. banc 1987).

A closer look at these cases clearly indicates that, under Missouri law, Kirby was entitled to recover if he proved use of the auger with the guards removed was reasonably anticipated. In *Nesselrode* (cited and relied on by the district court), plaintiff's decedent died in a small aircraft accident caused by the improper installation of the actuators.[2] The actuators are installed on each side of the airplane, and in this case the actuator for the right side had been installed on the left side of the airplane and vice versa. Reversing proper placement of the actuators caused the trim tabs to move in an opposite direction, resulting in the fatal airplane crash. *Nesselrode*, 707 S.W.2d at 374.

Plaintiff claimed the actuators were defectively designed in that they were visually identical, but functionally distinct, and, as such, were capable of being interchanged - i.e., reversed -- during installation. *Id.* at 374-75. Defendant asserted it was entitled to judgment as a matter of law because "the evidence proves the actuators were used in an abnormal fashion not intended by the manufacturer . . . and that the manufacturer could not reasonably have anticipated the reverse installation of the

---

2 "Actuators" are mechanical parts which allow the pilot to increase his altitude by trimming the airplane.

two actuators." *Id.* at 380. Reviewing Missouri's product liability cases, the Missouri Supreme Court clearly recognized, "the concept of reasonably anticipated use, however, includes misuse and abnormal use which is objectively foreseeable." *Id.* at 380-81. The court then summarily rejected defendant's argument that the negligent installation was as a matter of law a superseding cause sufficient to relieve it of any liability, stating:

> "This argument, however, is one that we cannot in good conscience accept. The plaintiff's entire stratagem was directed toward proving the incorrect installation of physically symmetrical but functionally asymmetrical parts was a natural and expected consequence of manufacturing actuators without "Murphy proof" design features. We find the evidence legally sufficient to support a finding that Beechcraft's design was a proximate cause of George Nesselrode's death. "

Id. at 381-82. The court concluded that the jury was "free to infer that an alternative design would have been safer and would have prevented the accident" and that it was "the function and duty of the jury to reason upon the evidence presented . . . ." Clearly, *Nesselrode* supports the lower courts' reasoning in the present case.

Further support of the lower courts' reasoning is found in *Bhagvandoss v. Biersdorf, Inc.*, 723 S.W.2d 392 (Mo. banc 1987). This case involved the use of an adhesive compression-type bandage manufactured by defendant and used to dress plaintiff's surgical wounds. The product was *not* a sterile product and was *not* sold as such. However, it was used to tape dressings to plaintiff's surgical wound. Soon after the bandage was applied, plaintiff's wound became infected, causing significant complications. The manufacturer asserted that (1) since the bandage was not sterile and not sold as such, its use to bandage an open wound was not proper; and (2) such use was not reasonably anticipated by appellant. *Id.* at 395, 396. Again, the Supreme Court of Missouri -- citing its earlier

opinion in *Nesselrode* -- stated, "a product may be unreasonably dangerous and defective even though it would not have caused injury when used properly, if the actual use is one reasonably anticipated by the manufacturer." Accordingly, the verdict in favor of plaintiff was affirmed.

An additional case directly on point is *Love v. Deere & Co.*, 684 S.W.2d 70 (Mo. App. 1985). *Love* was decided by the same court that decided *Gomez*. In this case, plaintiff was injured when he became entangled in an unguarded area of belts and pulleys on the left side of the combine. As the combine was originally manufactured and sold, this area was guarded by a shield. Defendant's argument was that plaintiff had failed to make a defective design case because there was no proof that the injury would have occurred if the shield had been in place. (This is one argument advanced by Petitioner in the present case.) However, the court recognized that plaintiff's claim was that the design of the guard was defective in that the guard fractured as a result of sympathetic vibrations with the belt and pulley mechanism to which the guard was attached. This resulted in the guard's failure and ultimate detachment from the combine. The court rejected defendant's argument concerning the adequacy of the guard *at the time the combine was sold*, stating:

> "The adequacy of the banana shield to guard the machinery when in its original configuration was irrelevant to plaintiff's case and, in fact, was a subject expressly withdrawn from the jury's consideration. For purposes of the claim, the assumption may be indulged, without detracting from plaintiff's substantive burden of proof, that the shield would have protected Love from injury had it remained attached to the combine."

Id. at 74. Defendant also advanced the argument that the use of the combine without the shield securely attached was an unanticipated use (virtually identical to Petitioner's

argument in the present case). In rejecting this argument, the court stated:

> "When Love's accident happened, the machine was being used for its designed purpose to combine crops. There is nothing unforeseeable about the continued use of the machine after failure of the shield. In fact, the evidence showed that respondent was aware that farmers would not interrupt their work because a guard shield became detached, but were more likely to postpone repair of a component which did not directly serve their combining function."

Id. at 76.

The claims in *Love* are virtually identical to the claims in the present case. The plaintiffs in both cases claimed that, by virtue of the original defective design of the guard, the machine was defective and unreasonably dangerous when put to a reasonably anticipated use. Defendants in both cased claimed that, had the guard been in place, no injury would have happened and use of the machine without the guard in place is not reasonably anticipated. The *Love* court rejected the defendant's claim outright. The rationale and result in *Love* further support the result reached by the lower courts in the present case.

Finally, *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), which interpreted and applied Missouri law, further supports the lower courts' result. Vanskike's arm was crushed when he hit a metal hitch with a hammer and the hitch tell on his arm. The hitch collapsed because someone had removed the retaining rings designed to hold the hitch in place. Vanskike's expert testified that the hitch design was defective because it permitted the retaining rings to come out, and it was foreseeable that the hitch would be operated without the retaining rings. ACF argued it was not liable for Vanskike's injuries since the hitch was not in the same condition (i.e., the retaining rings were missing)

when he was injured as when the hitch was sold (with retaining rings). The Eighth Circuit held that Vanskike made a submissible case under Missouri law on the issue of reasonably anticipated use and that the foreseeable alterations in the hitch did not absolve ACF of liability:

> "[S]ubsequent changes or alterations in the product do not relieve the manufacturer of strict liability if the changes were foreseeable and the changes did not unforeseeably render the product unsafe . . . . According to Dr. Somerset's [Vanskike's expert] testimony, the hitch's designers should have foreseen that the hitches would on occasion be operated without retaining rings. That is in fact what happened . . . . Although ACF may have intended that the hitches only be utilized with the retaining rings in place, Dr. Somerset testified that it was inevitable that the retaining rings come off and that the hitches would be operated without the retaining rings in place. Therefore, the Vanskikes did present evidence that the hitch was being used in a manner reasonably anticipated by ACF."

Id. at 195-96.

In summary, the cases reviewed and relied on by the lower courts clearly establish that an injured person makes a submissible defective product design case under Missouri law where they present substantial evidence that (1) the product was defective and unreasonably dangerous *at the time it was manufactured and sold*; and (2) the product was being used in a reasonably anticipated manner when it caused the injury. The jury found these issues in Kirby's favor. Subsequently, the lower courts reviewing the evidence found Kirby made a submissible case on this issue. Their findings are clearly consistent with Missouri law.

B. Kirby's evidence was that the auger "design" (even with the guards) was defective and unreasonably dangerous when put to a reasonably anticipated use, in that: (1) the operation of the auger required the guards to be periodically removed; (2) the guards were fully detachable when removed; (3) expert testimony corroborated by engineering literature established the foreseeability that guards removed for necessary operations will not be replaced; and (4) there were feasible alternative designs that would minimize the risk that the auger would be operated without the guards in place.

Kirby introduced substantial evidence of the type relied on in the aforementioned cases to establish his theory at trial. Throughout the trial, Kirby's claim was that the auger was defective and unreasonably dangerous at the time it was manufactured and sold due to a combination of design factors, but most notably the removable drive shaft guards.[3] Kirby's evidence that, due to the design of the auger, it was reasonably anticipated that the auger would be operated without the guards in place included the following:

1. Frequent guard removal during ordinary operation of the auger.

The drive shaft guards had to be removed for a variety of reasons during the ordinary operation of the machine. The guards had to be removed in order to:

(1) Gain access to the inspection hole in order to perform necessary maintenance on the internal bearings;

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3 Other design factors were those which contribute to the removal of the drive shaft guard. These include the presence of the internal bearing; the presence of the inspection hole located directly underneath the drive shaft; and the use of couplers secured by shear pins which sheared when the auger became clogged or overloaded.

(2) Gain access to the inspection hole in order to remove objects caught on the internal bearing which, in effect, was an obstruction in the path of moving material through the corkscrew flight;

(3) Replace pins and bolts in the drive shaft coupler which sheared when the auger:

a. clogged from foreign objects caught on the internal bearing;

b. was started under load;

c. became overloaded with seed; and

(4) Reach the grease zerk located near the inspection hole, which is required once every ten hours of operation on the auger.

Furthermore, it was admitted by Petitioner's corporate representative that removal of the drive shaft guard was completely foreseeable to the manufacturer and not a misuse of the product.

2. The guards were fully detachable when removed.

The drive shaft guards were bent sheet metal guards, approximately 5 feet long. They were cumbersome, with sharp edges. These metal guards were attached to the auger with screws at each end of the guard. In order to remove the guard, the operator must use a tool (a screwdriver or wrench) to remove the screws from each end. Once removed, the guard is completely detached from the auger. It can be set aside, misplaced, or damaged. To replace the guard, the operator must again use a tool to reinsert the screws at each end of the auger. This removal and replacement process takes approximately five to ten minutes. Often it had to be done repetitively because the texture of the seed being transported would cause the auger to clog repeatedly.

3. Foreseeability that guards would not be replaced.

Plaintiff presented substantial evidence which established that, in the real world, guards which must be removed for ordinary operation of a machine will be discarded and not replaced. This evidence was presented first through the testimony of plaintiff's two design engineers. These experts corroborated their testimony with a generous amount of engineering literature documenting this fact which dated back to 1917.[4]

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[4] Examples include the following:
Machinery's Encyclopedia (publication date 1917) -- "In many cases of injuries to operators caused by the absence of a suitable safeguard, it will be found that the safeguard has been removed or rendered ineffective by the employee . . . . Sometimes, however, so-called "guards" are encountered which are not guards at all but rather, delusions, indicating that the designer had appearance rather than utility in mind . . . . Many designers seem to believe that everything which looks like a cover for a part of a machine constitutes an effective safeguard, but it is not true if no regard is paid . . . to the likelihood of the guard being left off permanently . . . . It is important that the guards for machines are so designed and applied so that there is no temptation for the workmen to throw them aside as cumbersome. To educate the employee to use caution about dangerous machines is difficult enough, and it should not be rendered more so by making him work with an impractical safeguard."
Proceedings of the 45th Annual Convention of the Farm Equipment Institute (conducted in 1938) -- "As we collectively study how better to guard and protect the moving parts of the machines we manufacture, we expect to discover better and simpler means of accomplishing the job. Our immediate problem is just how to induce the farmer to keep the guards, that are now supplied for his protection, in place. We want to bear this in mind and we want you to help us on that. Every machine that is sent out that needs guards has guards on it. We also know, if you go to a farm, you will find most of the guards discarded, lost or not used."

(continued...)

Additionally, Petitioner's corporate representative admitted at trial that his company was aware that operators used their augers without the drive shaft guards in place. This was substantial evidence that it could be reasonably anticipated by the manufacturer that this auger would be used without the drive shaft guards in place.

4. Feasible alternative designs were presented to the jury.

In connection with Kirby's expert testimony, a number of feasible alternative designs were presented to the jury. These alternative designs would eliminate the risk posed by the rotating drive shaft altogether, or at least minimize the risk that the auger would be operated without the guards in place. The alternative designs included:

(1) Elimination of the top drive shaft altogether and driving the auger by means of a bottom drive shaft, a direct side drive shaft or hydraulically. Competitors manufacture and sell augers driven by these alternative designs.

(2) Providing "hinged" guards over the existing top drive shaft. This would allow ease of access to the couplers and inspection hole while making the guard a permanent part of the auger.

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[4](...continued)
Accident Prevention Manual for Industrial Operations, 4th Edition (published by National Safety Council, 1964) -- "A common complaint is that removal and nonreplacement of a machine guard is the cause of an accident. However, a more fundamental cause often lies in the root of the matter. Guards lying about do not necessarily indicate carelessness on the part of the operator, but show an inability of the guard designer to solve the problem."

(3) Providing interlock mechanical guards designed in such a way that unless the guard were in place, the drive line would not operate.

(4) Providing alternative coupling designs that would eliminate the need for roll pins which protrude from the coupling design incorporated by Petitioner. Splined couplings and keyed couplings were two alternatives suggested.

(5) Providing an adequate warning near the drive shaft to advise the operator of the severity of the risk posed by the rotating drive shaft.

Evidence of these feasible alternative designs allowed the jury to determine whether or not the auger design was defective and unreasonably dangerous.

The foregoing evidence supports the lower court's conclusion that plaintiff made a submissible case on the theory that the auger was defectively designed when put to a reasonably anticipated use. The jury could conclude from the evidence that ordinary operation of the auger required removal of the guards, and that it was foreseeable and reasonably anticipated that the guards would not be replaced. Thus, the lower courts' rulings were entirely consistent with Missouri law.

C. *Gomez* is not the "controlling state court decision," but only one of several decisions carefully reviewed by the lower courts.

As demonstrated above, *Gomez v. Clark Equipment Co.*, 743 S.W.2d 429 (Mo.App. 1987), is but one of a number of Missouri decisions addressing the issue of reasonably anticipated use. Since there are a number of Missouri Supreme Court decisions directly on point, *Gomez* cannot be considered "the controlling state court case," as Petitioner claims. Therefore, to the extent the lower courts rejected Petitioner's interpretation of *Gomez*, the

courts should not be accused of failing to follow the controlling law of the state of Missouri.

In any event, *Gomez* would not prohibit recovery in the present case. The subsequent modification in *Gomez* involved replacement of an original fuel tank on a lift truck with a fuel tank which obscured plaintiff's vision when driving the lift truck in reverse. Plaintiff was injured when she backed into a support post while driving the lift truck in reverse, crushing her hand. She was unable to see the support post due to the taller fuel tank. The *Gomez* court, in essence, concluded that there was no evidence that the lift truck was unsafe in the condition it was manufactured and sold by defendant. *Id.* at 433.

However, the *Gomez* court did not paint with the broad brush suggested by Petitioner. The court did not attempt to eliminate the reasonably anticipated use doctrine described in *Nesselrode* and *Bhagvandoss*. Moreover, the *Gomez* court conceded that where there is evidence that the product is defectively designed in such a manner that the modification is foreseeable, then the manufacturer is liable. In reviewing the results reached in *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), the *Gomez* court acknowledged that certain retaining rings had been removed from a railroad car hitch by a third person, allowing the roller pins to fall out, causing the hitch to collapse and resulting in plaintiff's injuries. *Id.* at 433. The *Gomez* court nevertheless agreed that this was not an intervening cause based on the evidence presented at trial, stating:

> "However, the removal of the retaining rings was not a superseding cause of injuries because there was expert testimony that the hitch was defectively designed so that it would not hold the retaining rings at all. Unlike the case of *Vanskike*, *supra*, in the present case there was no evidence of any defect in the truck as provided by the respondent."

Id. at 433. Applying the *Gomez* court's analysis to the present case, there is substantial evidence that supported the jury's finding that the auger would be operated without the drive shaft guards in place due to the defective design of the auger, and specifically the defective design of the guards. There was also substantial evidence that the auger was defectively designed and unreasonably dangerous at the time it was provided (manufactured and sold) by Petitioner. Therefore, upon careful analysis the results reached in this case by the lower courts would not have been different, even under Petitioner's interpretation of *Gomez*.

CONCLUSION

For the aforementioned reasons, respondent respectfully requests the Court to deny the Petition for Writ of Certiorari and for such other relief as this Court deems appropriate under the circumstances.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LEAR SIEGLER, INC., a Delaware Corporation,
Petitioner,

v.

RANDALL SCOTT KIRBY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

The decision of the Eighth Circuit here warrants review by this Court.

A. The Court of Appeals Ignored the Controlling State Court Decision

Respondent's brief opposing certiorari contains extensive discussion of general principles of Missouri products liability law. That discussion, while informative, is not directly relevant to this Court's jurisdiction. One narrow and very specific ruling by the federal trial court below makes this case "certworthy." That ruling, and its express legal and factual justification, are indisputable.

The federal trial court in this case refused to apply the most recent Missouri law on point. *See* Petition for Cer-

tiorari at 7-9. The judge stated his reasons in clear and direct terms—in his opinion three Missouri appellate judges had simply interpreted Missouri law incorrectly. *Id.* In making this ruling, the federal judge denied petitioner access to its best defense under Missouri law. *Id.* at 10. In state courts in Missouri a consumer who modifies a product and later suffers injury can be barred from the courtroom as a matter of law. *Gomez v. Clark Equipment Co.*, 743 S.W.2d 429, 433 (Mo. App. 1987). In this federal court the same Missouri modification defense is not allowed.[1] Petition for Certiorari at 7-10. As set out fully in the Petition for Certiorari, the offense to federalism principles is clear. *Id.* The per curiam appellate ruling affirming this trial decision is plainly wrong and should not be allowed to stand.

B. *Salve Regina College v. Russell* Requires Summary Reversal

On March 20, 1991 this Court decided *Salve Regina College v. Russell*, —— S. Ct. ——, 59 U.S.L.W. 4219 (U.S. Mar 20, 1991). *Salve Regina* discarded the traditional "automatic" deference afforded to a district court's interpretation of the law in its state, calling for a "review de novo [of] a district court's determination of state law" by the federal appellate court. 59 U.S.L.W. at 4220. The purpose of the new standard is to ensure full appellate review: "Independent appellate review necessarily entails a careful consideration of the district court's legal analysis." *Id.* at 4221.

The appellate court in this case obviously did not know or apply this new standard of review at the time it ren-

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[1] Respondent makes two arguments to oppose certiorari: 1) that the removal of the safety shield in this case was only a misuse of the product, not a modification, and 2) that other designs like a "hinged" shield would have been safer. *See* Op. Cert. at 9-24. These state law arguments do not affect the basic error below—the federal court denied Lear Siegler access to a complete defense, available in Missouri state courts, that could have won its case.

dered its opinion. The thirteen line per curiam order of the Eighth Circuit (Petition for Certiorari, Appendix A), in no way meets the new test of de novo appellate review. To the contrary, the "traditional deference" accorded trial courts is obvious on the face of the summary opinion. This Court should reverse summarily the decision below and remand the case for review in light of the *Salve Regina College* decision.

CONCLUSION

The petition for writ of certiorari should be granted and the judgment below should be summarily reversed or the case should be set for briefing and oral argument.

Respectfully submitted,

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